



Commercial Agents Update 2010 (Part 2)

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1. When can a Principal avoid paying compensation following termination of a commercial agency agreement?

Regulation 18(a) states that a Principal is not required to pay compensation where he has terminated the agency agreement "because of default attributable to the commercial agent which would justify immediate termination of the agency contract"

This applies where there has been a serious breach of contract by the agent, known as a repudiatory breach, which entitles the principal to terminate the contract with immediate effect

This happened in *Nigel Joinery Services v Ian Firth Hardware* (see above) where the agent disobeyed the principal's instructions to provide weekly reports and to work exclusively for the principal (subject to notifying the principal of competing work).

Court decided this conduct, which amounted to sustained and persistent breach of contract, was a repudiatory breach of the contract, so Regulation 18(a) applied.

2. Indemnity clarified by the European Court of Justice ("ECJ")

In a German case, *Turgay Semen v Deutsche Tamoil GmbH*, referred to the ECJ, the Court made two findings which are relevant for Commercial Agency Agreements which provide for an indemnity to be paid on termination

■ When calculating the indemnity, unless otherwise agreed by the parties, benefits accruing to other parties in the principal's corporate group are not considered to be benefits of the principal, so can be ignored for the purpose of calculating the indemnity.

The Court cannot automatically limit the amount of the indemnity to the amount of commission lost by the agent after termination. In fact, there is no indication that the English Courts were contemplating this approach, but the clarification is helpful nonetheless.

3. Notice of claim for compensation – when does time start to run?

A crucial part of the Commercial Regulations that all agents need to be aware of is that you lose your right to compensation or an indemnity if you fail to serve notice of your intention to make a claim within one year of termination of your agency agreement (Regulation 17(9)).

If you fail to comply with the notice requirements in the Regulations you will lose your claim to an indemnity or compensation however strong your case may have been.

Generally, the best approach is to serve notice as soon as possible so that there can be no doubt that you have met the one year deadline.

Sometimes, however, the question of when exactly the agency agreement comes to an end is not entirely straightforward and, of course, it is only once termination has happened that the one year for giving notice starts to run under the Regulations.

This was the issue the Court was required to consider in *Claramoda v Zoomphase Limited* (2010). The case involved an agent who sold a range of women's clothing and had been told by her principal that the Spring/Summer 2007 season was to be the last season she would act as commercial agent.

That season came to an end in October 2006, but further commercial activity, including dealing with customer concerns about orders and discrepancies over paperwork continued until January 2007.

The agent served notice in November 2007 (i.e. more than a year after the end of the Spring/Summer fashion season, but less than a year after the other commercial activities came to an end in January 2007).

The principal argued that the agent's "authority to negotiate sales", which is a pre-requisite of being a commercial agent under the Regulations, came to an end when the Spring/Fashion 2007 season ended in October 2006, meaning the commercial agency also ended on that date.

The Judge disagreed and decided that the commercial activity that took place after the end of the fashion season was indistinguishable from the earlier activity, and therefore the agent remained a commercial agent until January 2007 meaning her notice was within time.

Usually the termination date of an agency agreement can be established easily from the terms of the contract, but this case provides a helpful reminder of the potential risks if you delay serving notice of a claim.

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